

COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION ONE
June 29, 2009

D054754 People v. Hajjaj

The order granting Hajjaj's motion to dismiss and the judgment of dismissal are reversed, and the matter is remanded for further proceedings.
Nares, J.; We Concur: McConnell, P.J., Benke, J.

D052723 People v. Hilton

The judgment is affirmed. Nares, J.; We Concur: McConnell, P.J., Benke, J.

D054005 Kunit v. Kingston

The matter having been considered by Presiding Justice McConnell and Associate Justices Huffman and Aaron, the appeal is dismissed on the ground the May 2, 2008, minute order identified in the notice of appeal is not appealable because it directs preparation of a formal order and no such order has been filed. (Cal. Rules of Court, rule 8.104(d)(2); *Herrscher v. Herrscher* (1953) 41 Cal.2d 300, 304-306.) The dismissal is without prejudice to appeal from a properly entered order.

COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION ONE
June 30, 2009

- D054458 Xnergy v. Hess Microgen, LLC**
Upon written request filed by appellant Hess Microgen, LLC., the appeal is dismissed and the remittitur is ordered to issue immediately.
(Cal. Rules of Court, rule 8.244(c)(2).)
- D054458 Xnergy v. Hess Microgen, LLC**
Upon written request filed by appellant Xnergy, the appeal is dismissed and the remittitur is ordered to issue immediately. (Cal. Rules of Court, rule 8.244(c)(2).)
- D054838 In re Murphy on Habeas Corpus**
The petition is denied.
- D053965 People v. Wolfe**
The judgment is affirmed. McConnell, P.J.; We Concur: Huffman, J., McDonald, J.
- D053460 In re Christian D., a Juvenile**
The judgment is affirmed.
Irion, J.; We Concur: Huffman, Acting P.J., McDonald, J.
- D054809 Ladou v. Superior Court of San Diego County/City of Chula Vista**
The petition is denied.
- D055272 Busheff v. The Superior Court of San Diego County/Wilderman**
The petition is denied.
- D052102 Neuman et al. v. Potomac Group West et al.**
D052796 Neuman et al. v. Potomac Group West et al.
(Consolidated) That portion of the appeal asserting only Potomac should bear the receiver's fees is stayed. We order \$900 in sanctions against Leisher and \$900 in sanctions against attorney Blumberg payable to Wilson. We modify the orders to make Leisher jointly and severally liable for the total amount of receivership expenses awarded as against Potomac and Leisher. In all other respects, the orders are affirmed. Wilson shall recover his costs on appeal.
Nares, J.; We Concur: McConnell, P.J., Benke, J.
- D054855 In re Thompkins on Habeas Corpus**
The petition is denied.

COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION ONE
July 1, 2009

- D053755 Goldstein v. Williams**
The petition for rehearing or to modify decision is denied.
- D053908 Harris v. Metropolitan Transit System et al.**
The petition for rehearing is denied.
- D051772 In re Haugen on Habeas Corpus**
Relief denied. McConnell, P.J.; I Concur: Irion, J.; I Dissent: McDonald, J.
- D054775 People v. Sevilla**
The judgment is reversed to the extent it awarded Sevilla only 584 days of presentence custody credit. In all other respects, the judgment is affirmed. The matter is remanded with directions that the trial court award Sevilla 627 days of presentence custody credit, amend the abstract of judgment to reflect that change, and forward a copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation.
McDonald, J; We Concur: Huffman, Acting P.J., O'Rourke, J.
- D051669 Huber et al. v. Jackson et al./The Episcopal Church**
The petition for rehearing is denied.
- D051669 Huber et al. v. Jackson et al./The Episcopal Church**
The opinion filed June 9, 2009, is ordered certified for publication.

COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION ONE
July 2, 2009

D049216 Riverwatch v. County of San Diego Department of Environmental Health et al.
The opinion filed June 12, 2009, is ordered certified for publication.

D053568 People v. Riskas
The judgment is affirmed.
Huffman, Acting P.J.; We Concur: Nares, J., O'Rourke, J.

D053491 Chau et al. v. Starbucks Corporation
The petition for rehearing filed by Jou Chau, et al. on June 17, 2009, and the petition for rehearing filed by Starbucks Corporation on June 18, 2009, are denied.

I. On its own motion, the court deletes references to *Grodensky v. Artichoke Joe's Casino* (2009) 171 Cal.App.4th 1399 because the California Supreme Court granted a petition for review in the *Grodensky* case after this court filed the instant opinion. (See Cal. Rules of Court, rule 8.1115(a).) These modifications are as follows:

1. In the first complete paragraph on page 15, the reference to *Grodensky v. Artichoke Joe's Casino* (2009) 171 Cal.App.4th 1399 is deleted.

2. On page 15, footnote number 4 is deleted, and is replaced with the following footnote number 4:

In supplemental briefing, plaintiffs cited to two additional decisions, but the California Supreme Court has since granted a review petition in those cases. (*Lu v. Hawaiian Gardens Casino, Inc.* (2009) 170 Cal.App.4th 466, review granted April 29, 2009, S171442; *Grodensky v. Artichoke Joe's Casino* (2009) 171 Cal.App.4th 1399, review granted June 24, 2009, S172237.)

3. In the paragraph beginning on page 19, the first sentence is deleted. The first word of the second sentence is deleted and the word "thereafter" is added to the beginning of the sentence, so the sentence reads:

Thereafter, three courts extended *Leighton* to the situation where the employer requires waitresses/waiters to share their tips with other restaurant employees who do not provide services directly to the customer's table (e.g., bartenders, dishwashers).

4. On page 20, the first complete paragraph is deleted.

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DIVISION ONE

July 2, 2009 (Continued)

5. In the paragraph beginning on page 22 and continuing on page 23, the last sentence and the subsequent citation are deleted, so the paragraph reads:

Jameson agreed with this reasoning, but qualified it by noting that it would be improper to presume a customer's intent that an employee share his or her tips with an employer's agent because the statute expressly prohibits an agent from collecting, taking, or receiving a tip *given to an employee*. (*Jameson, supra*, 107 Cal.App.4th at p. 140.) Thus, the *Jameson* court concluded that agents may not share in a "tip pool." (*Id.* at p. 145.) The *Louie*, *Budrow*, and *Etheridge* courts agreed with *Leighton's* implied "collective" intent rationale and applied it to include all nonagent employees who are in the chain of service, even if they do not come to the customer's table. (*Etheridge, supra*, 172 Cal.App.4th at pp. 921-923; *Budrow, supra*, 171 Cal.App.4th at pp. 878-884; *Louie, supra*, 460 F.Supp. at pp. 1159-1161.)

II. We also modify the opinion as follows:

1. In the fifth sentence of the first complete paragraph on page 4, the word "generally" is added between the words "supervisors" and "spend," so the sentence reads:

Shift supervisors generally spend more than 90 percent of their time performing the same service tasks as do the baristas.

2. In the fourth sentence of the first complete paragraph on page 5, enumeration (3), the word "by" between the word "hours" and "the" is deleted and replaced with the word "into," so the sentence reads:

Additionally, only baristas and shift supervisors are eligible to count and distribute the tips. To calculate the weekly tip distribution, the selected counting employee must: (1) determine the total monetary amount from the tip container; (2) calculate the total number of hours worked by all baristas and shift supervisors in the particular store; (3) divide the total amount of hours into the store's total earned tips for the week to obtain the tip hourly rate; (4) multiply each of the barista and shift supervisor hours by the tip hourly rate to determine each employee's tip income; and (5) place each employee's tip income in a sealed envelope, label the envelope with the employee's name, and store the envelope in the safe until the employee is available to take possession of it.

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July 2, 2009 (Continued)

3. The following footnote is added at the end of the first complete paragraph on page 11. The addition of this footnote requires renumbering of all subsequent footnotes.

Because our holding is based on an argument repeatedly raised by Starbucks in the trial below and in its appellate briefs, we reject plaintiffs' contention in their petition for rehearing that Starbucks waived the argument and/or that our decision violates Government Code section 68081.

4. The following paragraphs are added at the end of Section II on page 25, immediately preceding Section III:

In a petition for rehearing, plaintiffs challenge statements in our opinion that it was "undisputed" that customers who leave money in a collective tip box intend the tip for employees who provide customer service. They assert that customer intent was not an issue at trial, and note that neither party presented any testimony from a customer as to the customer's subjective intent in placing a tip in a collective tip box or how the customer intended to allocate a tip for more than one employee. Based on this lack of customer intent testimony, plaintiffs argue that we cannot properly refer to the "undisputed" fact that individuals place tip money in a collective tip box intending that the tip proceeds will be shared among service personnel.

The argument is unsupported on factual and legal grounds. Plaintiffs had the burden of proving their claim, and they presented no evidence or argument that customers placed tips in a collective tip box with the understanding or intent to benefit only the barista class of employees. To the contrary, the testimony by baristas and shift supervisors was undisputed that customers leave tips in the collective tip boxes for the service team, which includes both shift supervisors and baristas, and that customers could not distinguish between these employees.

Moreover, it was not necessary for either party to present direct evidence from customers to establish the fact that persons who place tips in a *collective* tip box understand that tips will be divided by the service personnel. Clearly, the tips were left for someone. Whether one presents specific evidence on the issue, considers a dictionary definition, references case law authority, or applies established social mores, it is well established tips are given in return for service. Our statements about undisputed customer intent in leaving a tip in a collective tip box reflect this simple proposition. There is nothing remarkable in concluding, and it follows logically, that the tips were intended for those who provided service. To suggest otherwise ignores reality, something the law does not require.

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July 2, 2009 (Continued)

Additionally, until their petition for rehearing, plaintiffs have never concerned themselves with, or challenged, the manner in which tips are divided among the employees who they claim are legally entitled to share the tips. This case has always been about determining whether California law prohibits a category of Starbucks service employees from sharing in a collective tip; it has never been about determining the manner in which eligible employees share the tip. Nothing in our decision depends on any presumed customer intent with respect to a particular allocation of a tip.

There is no change in the judgment.

D054740 People v. Anderson

The defendant's convictions on counts 1 and 2 and the special circumstance finding are reversed. In all other respects, the judgment is affirmed. The People shall have 60 days after remittitur to the trial court to inform the court whether they will retry the defendant on all or part of the counts and special circumstance alleged in the information. In the event the People do not timely elect to retry the defendant, the trial court shall confirm the defendant's original conviction on count 3 and resentence him. McDonald, Acting P.J.; We Concur: O'Rourke, J., Irion, J.

D054307 People v. Mingo

Judgment affirmed. McDonald, J.; We Concur: Benke, Acting P.J., Nares, J.

D054338 In re Jasmine P. et al., Juveniles

The appeals are dismissed. Irion, J.; We Concur: McConnell, P.J., Huffman, J.

D053584 In re Tatiana V. et al., Juveniles

The request for publication of the opinion is denied.

D055224 Riney v. Safeway, Inc., et al.

The petition for writ of supersedeas, request for stay and motion or application to place records under seal have been read and considered by Justices Benke, McIntyre and Irion. The petition is denied. The application to place records under seal is denied.

The clerk is directed not to place the record submitted "conditionally under seal" in the case file and return it to petitioner's counsel unless counsel notifies the clerk in writing within 10 days after the order denying the motion or application that the record is to be filed. (Cal. Rules of Court, rule 8.160(e)(7).)

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FOURTH APPELLATE DISTRICT
DIVISION ONE

July 2, 2009 (Continued)

D054461 In re E.N. et al., Juveniles

The orders are affirmed.

McIntyre, J.; We Concur: Benke, Acting P.J., O'Rourke, J.

D055303 Campoy v. Superior Court of San Diego County/Abin

The petition for writ of mandate, response and reply have been read and considered by Justices Huffman, McIntyre and Irion. The petition is denied. The clerk is directed not to accept real party's "supplemental reply and opposition to requested writ relief" for filing and to return the document to real party.

D055359 In re Alve on Habeas Corpus

The petition for writ of habeas corpus has been read and considered by Justices Benke, McIntyre and Irion. A jury found Alejandro Alve guilty of murder and other crimes in 1976, and the court sentenced him to seven years to life. On January 6, 2009, the Board of Parole Hearings (Board) found him unsuitable for parole. In this petition, Alve challenges the recent Board decision. He indicates he has not filed a petition on this issue in any other court.

"A Court of Appeal must deny without prejudice a petition for writ of habeas corpus that challenges the denial of parole or the petitioner's suitability for parole if the issue was not first adjudicated by the trial court that rendered the underlying judgment." (Cal. Rules of Court, rule 8.385(c)(2).) The petition is denied without prejudice to refiling in San Diego County Superior Court, 220 West Broadway, San Diego, California 92101. The clerk is directed to retain one copy of the petition for our records and return the original petition and all other copies to Alve, so he may file them in the appropriate court.

D054285 People v. Cesena

Upon filing an abandonment of appeal personally signed by the defendant, the appeal is dismissed and the remittitur is ordered to issue immediately.
(Cal. Rules of Court, rule 8.316.)

D054266 In re J.J., a Juvenile

The judgments are affirmed.

McDonald, J.; We Concur: Huffman, Acting P.J., O'Rourke, J.

D054219 People v. Miles

Judgment affirmed. Aaron, J.; We Concur: Huffman, Acting P.J., Nares, J.

COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION ONE
July 2, 2009 (Continued)

- D054399 In re R.C., a Juvenile**
The judgment is affirmed.
Nares, J.; We Concur: Huffman, Acting P.J., McDonald, J.
- D055039 Pitones v. Superior Court of Imperial County/Bristow**
The petition is denied.
- D053793 People v. Madrigal**
The judgment is affirmed. Aaron, J.; We Concur: McDonald, Acting P.J., Irion, J.
- D055400 Free Sacred Trinity Church v. Superior Court of San Diego/Sharp Healthcare**
The petition is denied.
- D050848 Troyk v. Farmers Group, Inc., et al.**
Upon written stipulation filed by the parties, the appeal is dismissed and the
remittitur is ordered to issue immediately. (Cal. Rules of Court, rule, 8.244(c)(2).)